

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DAVID BACK,

NO. CIV. S-04-5 LKK/CMK

Plaintiff,

v.

O R D E R

ALLSTATE INSURANCE COMPANY,  
INC.,

Defendant.

Defendant moves to exclude recovery of the excess judgment. It acknowledges, however, that under the court's previous order relative to a failure to investigate, plaintiff may obtain a judgment which includes damages up to the policy limits plus defense costs (asserted to be zero), and extra-contractual damages, i.e. emotional distress and punitive damages arising out of the failure to investigate. The court agrees with defendant's contention and its concession.

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1       Regarding the duty to settle, plaintiff takes issue with the  
2 court's conclusion, citing and raising for the first time, Allen  
3 v. Allstate Insurance Co., 655 F.2d 487, 490 (9th Cir. 1981).  
4 While plaintiff's counsel's conduct may be viewed as an untimely  
5 motion to reconsider, the court has no desire to commit error  
6 because it refused to take up plaintiff's contention. Accordingly,  
7 the court ORDERS as follows:

8       1. Defendant's motion to preclude recovery of the excess  
9 judgment is GRANTED;

10       2. The hearing, currently set for September 26, 2005, is  
11 VACATED;

12       3. Defendant shall respond to plaintiff's contention relative  
13 to Allen, supra, within ten days; and

14       4. Thereafter, plaintiff's argument, construed as a motion  
15 to reconsider, will stand submitted.

16       IT IS SO ORDERED.

17       DATED: September 1, 2005.

18                               /s/Lawrence K. Karlton  
19                               LAWRENCE K. KARLTON  
20                               SENIOR JUDGE  
21                               UNITED STATES DISTRICT COURT  
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